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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

**In re JOSHUA A., a Person Coming
Under the Juvenile Court Law.**

**SAN MATEO COUNTY HUMAN
SERVICES AGENCY,**

Plaintiff and Respondent,

v.

JACQUELYN A.,

Defendant and Appellant.

A126954

**(San Mateo County
Super. Ct. No. 75208)**

Jacquelyn A. (Mother) appeals an order terminating her parental rights over her son Joshua A., born in February 2006. (Welf. & Inst. Code, § 366.26.)¹ Mother contends the juvenile court erred in failing to apply the continuing beneficial relationship exception to parental termination. (§ 366.26, subd. (c)(1)(B)(i).)² We reject the contention and affirm.

BACKGROUND

In March 2006, Joshua was declared a dependent of the court. He remained in Parents' custody with reunification services until April 2009, when he was placed in foster care.

¹ All further undesignated section references are to the Welfare and Institutions Code.

² Father's parental rights over Joshua were also terminated; however, he is not a party to this appeal. Mother and Father are collectively referred to as Parents.

The San Mateo County Human Services Agency's (Agency) October 2009 section 366.26 report noted that Joshua's speech and language and "concerning behaviors" had improved since his July 2009 placement with his foster/adopt parents. He was receiving weekly individual therapy and family therapy with his foster/adopt parents. He had developed an attachment with his foster/adopt parents and called them "Mama" and "Daddy." Joshua explained to many adults that he had "two mommies and two daddies." Since the last court hearing, Parents were having supervised visits with Joshua every other week, but had missed one visit in July when Mother was incarcerated. During most visits, Mother isolated herself, making minimal attempts to interact with Joshua. Parents sometimes bickered or discussed inappropriate topics in front of Joshua. Mother cried, corrected Joshua and told him he hurt her feelings when he said he had two mommies and two daddies. She said she would always correct him if he said that. Following visitation with Parents, Joshua's behavior at his foster/adopt home was more defiant and aggressive. Over time, such behaviors would decrease by the next morning. The report found that Joshua was adoptable and there appeared to be no detriment to severing Parents' parental rights. Although Joshua recognized Parents as "mommy" and "daddy," he did not have a healthy parent-child attachment with either parent. The Agency recommended termination of Parents' parental rights and adoption as the permanent plan.

An October 2009 report from Joshua's Court Appointed Special Advocate (CASA) stated Joshua was adjusting very well to his foster/adopt placement and should remain there since his needs were being met. After visits with Parents, Joshua had several hard days of disruptive, defiant, acting-out behavior. The CASA recommended discontinuing such visits because of Joshua's upsetting behavior during and after the visits. On one occasion, Joshua told the CASA he wanted to live with Parents for a while and then "come back and live [with his foster/adopt parents]." Joshua appeared to enjoy the visits with Parents but was frustrated because they expected him to eat when he was not hungry and expected him to be photographed when he did not want to be. In addition, Parents had allowed inappropriate play at visits. More recently, Joshua was doing more acting out after visits and was obviously confused.

The Agency's November 2009 section 366.26 addendum report stated that Joshua continued to express themes in his therapy showing that he was processing having "two families." He showed a sense of security when he talked about his foster/adopt parents. He continued to exhibit defiant and sometimes aggressive behavior after visits with Parents. Parents continued to deny him the opportunity to express his understanding of his life situation. At one visit he named his "one mommy" as his foster/adopt mother. The report recommended that visits with Parents be terminated due to the escalation of Joshua's negative behaviors following visits. The Agency again said termination of Parents' parental rights would not be a detriment. Parents' lifestyle was chaotic and they denied having any issues to address. Joshua did not have a healthy parent-child relationship with Mother or Father and it would not be in his best interest to maintain a relationship with them.

At the December 1, 2009 section 366.26 hearing, Agency social worker Kristen Klein, primary social worker on the case since July, said that Mother had been consistent in attending visits with Joshua. Joshua usually appeared excited to see Parents, hugged Mother and, at times, appeared happy to see her. He called Mother "mommy" and separated easily from her; usually he did not want to hug or kiss goodbye. Since Joshua was placed with his foster/adopt family he seemed to overcome his maltreatment disorder. Mother did not appropriately address Joshua's confusion over having two families. Klein opined that Mother was putting her own needs in front of Joshua's.

Mother testified Joshua was in her custody for the first three years of his life and had been out of her custody since April 1, 2009. She said he called her "mommy" during visits and came to her for comfort. She said it would be in Joshua's best interest to continue the relationship with Parents because she loved him, his family loved him, and he should know they did not want to give him up and had done everything they could.

Parents' counsel argued the continuing beneficial relationship exception applied to bar termination of Parents' parental rights.

The court found Joshua adoptable. It found no evidence of detriment to Joshua from terminating Parents' parental rights and ordered their parental rights terminated.

DISCUSSION

Mother contends the court erred in failing to conclude that the continuing beneficial relationship exception (§ 366.26, subd. (c)(1)(B))³ applies to prevent termination of her parental rights over Joshua.

At a section 366.26 hearing, where possible, adoption is the permanent plan preferred by the Legislature. (*In re L. Y. L.* (2002) 101 Cal.App.4th 942, 947.) Where the court finds a minor cannot be returned to his or her parent and is likely to be adopted if parental rights are terminated, it must select adoption as the permanent plan unless it finds that termination of parental rights would be detrimental to the minor under one of six enumerated exceptions. (§ 366.26, subd. (c)(1)(B); see *In re L. Y. L.*, at p. 947.) It is the parent's burden to establish the existence of one of the exceptions to termination. (*In re Thomas R.* (2006) 145 Cal.App.4th 726, 731.)

In *In re Autumn H.* (1994) 27 Cal.App.4th 567, the court interpreted the beneficial relationship exception to mean "the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*Id.* at p. 575.) The child's age, the portion of the child's life spent in the parent's custody, the effect of the interaction between the parent and child, and the child's particular needs, are factors which may be considered by

³ Section 366.26, subdivision (c)(1), provides that if the juvenile court finds the child adoptable, ". . . the court shall terminate parental rights and order the child placed for adoption . . . unless . . . : [¶] . . . [¶] (B) The court finds a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances: [¶] (i) The parents have maintained regular visitation and contact with the child and the child would benefit from the continuing relationship."

the court in considering the applicability of the beneficial relationship exception. (*Id.* at pp. 575-576.)

Although the beneficial relationship exception does not require proof that the minor has a “ ‘primary attachment’ ” to the noncustodial parent or that the noncustodial parent has maintained day-to-day contact with the minor (*In re S.B.* (2008) 164 Cal.App.4th 289, 300), “the relationship must be such that the child would suffer detriment from its termination.” (*In re Angel B.* (2002) 97 Cal.App.4th 454, 467.)

A trial court’s determination regarding the beneficial relationship exception is affirmed if supported by substantial evidence. (*In re S.B.*, *supra*, 164 Cal.App.4th at p. 297; *In re B.D.* (2008) 159 Cal.App.4th 1218, 1235.) We review “the evidence most favorably to the prevailing party and indulg[e] in all legitimate and reasonable inferences to uphold the court’s ruling.” (*In re S.B.*, at p. 297.)⁴

Here, the record establishes that Mother maintained regular contact and visitation with Joshua. The major issue is the second prong of the continuing beneficial relationship exception—whether Joshua would benefit from continuing the parental relationship with Mother. We conclude that substantial evidence supports the court’s finding that Mother failed to establish a parent-child relationship sufficient to qualify for the section 366.26, subdivision (c)(1)(B)(i) exception, as interpreted by *In re Autumn N.* and its progeny.

At the commencement of the section 366.26 hearing, Joshua was almost four years old and had spent about three years in Mother’s custody. Mother has a long history of mental illness and substance abuse. The reports and testimony of the Agency social worker and the CASA unequivocally stated that Joshua’s behavior had improved since being placed with his foster/adopt family and he appeared to have overcome his maltreatment disorder. During visits with Parents, Mother isolated herself, making minimal attempts to interact with Joshua. She continuously denied him the opportunity

⁴ The Agency urges us to apply an abuse of discretion standard, but acknowledges that under either a substantial evidence or abuse of discretion standard, the result in this case would be the same.

to express his understanding of his life situation by correcting him, ignoring him or saying he hurt her feelings when he said he had two mommies and two daddies. Before and after visits with Parents, his anxious, defiant, and aggressive behaviors escalated. Moreover, Mother appeared to put her own needs before those of Joshua. Parents relocated 13 times since Joshua's birth. Less than a year before the section 366.26 hearing, Mother twice tested positive for "THC" and marijuana and was arrested and jailed on warrants for providing false identification to a peace officer and driving on a suspended license. Despite 40 months of reunification services, Mother's lifestyle remained chaotic and she denied having any issues to address. The evidence established that Joshua did not have a healthy relationship with Mother and it would not be in his best interest to maintain a parent-child relationship with her.

We conclude the evidence before us does not support a conclusion that the relationship between Joshua and Mother promoted Joshua's well-being to the extent that it would outweigh the well-being Joshua would gain in a permanent, stable home with the adoptive parents. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) Substantial evidence supports the court's determination that the continued beneficial relationship exception does not apply.

DISPOSITION

The order is affirmed.

SIMONS, Acting P.J.

We concur.

NEEDHAM, J.

BRUINIERS, J.